United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B P/S

74-1582

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

Docket No. 74-1582.

JOHN J. GALGAY, as Trustee in the Reorganization of R. HOE & CO., INC.,

Plaintiff-Appellant,

v.

BULLETIN COMPANY, INC.,

Defendant-Appellee.

On Appeal From the United States District Court for the Southern District of New York.

BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLEE BULLETIN COMPANY.

FRANK A. FRITZ,
JEFFREY S. COOK,
BLEAKLEY, PLATT, SCHMIDT & FRITZ,
120 Broadway,
New York, New York. 10005

Attorneys for Appellee.

Of Counsel:
JOHN R. MCCONNELL,
JOSEPH A. TORREGROSSA,
MORGAN, LEWIS & BOCKIUS,
123 South Broad Street,
2100 The Fidelity Building,
Philadelphia, Pa. 19109

Dated: July 22, 1974

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

2

TABLE OF CONTENTS OF APPELLEE'S BRIEF.

TABLE OF CONTENTS OF SUPPLEMENTAL APPENDIX.

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

STATUTES.

MISCELLANEOUS.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

Docket No. 74-1582.

JOHN J. GALGAY, AS TRUSTEE IN THE REORGANIZATION OF R. HOE & CO., INC.,

Plaintiff-Appellant,

v.

BULLETIN COMPANY, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLEE BULLETIN COMPANY.

SHORT SUMMARY OF THE CASE.

Plaintiff, John J. Galgay, the Trustee of a bankrupt machinery manufacturer, R. Hoe & Co., Inc., brought this contract action in the United States District Court for the Southern District of New York against defendant, Bulletin Company, a Philadelphia newspaper, upon a contract made in Pennsylvania.

Defendant moved to dismiss upon the ground that it was not doing business or subject to jurisdiction in New York. Upon detailed evidence, the District Court granted defendant's motion.

Plaintiff here appeals from that dismissal.

COUNTER STATEMENT OF ISSUE PRESENTED FOR REVIEW.

Whether the District Court erred in granting defendant's Motion to Dismiss the Complaint for lack of *in personam* jurisdiction on the ground that defendant had not transacted business in New York pursuant to New York CPLR § 302(a)(1) where (i) all of the negotiations which led to the contract took place in Philadelphia, Pennsylvania, (ii) the contract was signed by defendant's representatives in Philadelphia, (iii) the defendant was at no time present in New York in connection with the contract, (iv) the contract provided that the risk of loss of the machinery sold under the contract was not to be borne by the defendant until the machinery arrived in Philadelphia, (v) the machinery was shipped in parts to Philadelphia, not by defendant, but by a subcontractor of an independent contractor engaged by defendant, and (vi) the machinery was assembled and installed in Philadelphia under the supervision of plaintiff.

COUNTER STATEMENT OF FACTS.

This action is brought by the Trustee of a bankrupt company, R. Hoe & Co., Inc. (hereafter "Hoe") and arises out of a contract between Hoe and Bulletin Company (hereafter "Bulletin") under which Hoe agreed to sell certain printing machinery to Bulletin for a total sum of $1,178,459.10 (5a). Bulletin has paid $1,155,813.00 to Hoe but has refused to pay the balance of $22,566.10 on the ground that the machinery is defective and does not operate as warranted by Hoe (9a, 10a).

Bulletin is a Pennsylvania corporation engaged in the publication of the Evening and Sunday Bulletin newspapers. It has no property in New York; has no offices or employees in New York; is not licensed to do business in New York; and circulates less than 1% of its daily and Sunday newspapers in New York (50a).

The face-to-face negotiations which led to the contract in suit were conducted in meetings held at Bulletin's offices in Philadelphia (8a, 11a, 38a, 48a). There were approximately twelve such meetings in Philadelphia, all of them attended by a Hoe representative who travelled to Philadelphia for this purpose (11a, ¶ 5). There were no face-to-face meetings in New York. The negotiations were also conducted by telephone and mail communication between the two cities (48a).

The negotiations eventually culminated in the forwarding of a "Proposal" by Hoe to Bulletin. A Bulletin representative signed this document in Philadelphia on December 15, 1966 below the words "Accepted." (7b of the Supplemental Appendix contained herein, *infra*). At the time the Bulletin representative signed this "Proposal" it had already been signed by a Hoe representative (39a, ¶ 4). Bulletin then paid Hoe $58,871 as the first installment due under the contract (39a, ¶ 6). Upon the signing of this

document by a Bulletin representative and upon payment of the first installment, Bulletin asserts that the parties entered into a binding contract. Accordingly, final execution of the contract in suit took place in Philadelphia, not in New York as contended by Hoe. Later, on or about February 2, 1967, Hoe forwarded a formal contract to Bulletin which a Bulletin representative signed in Philadelphia.[1]

Pursuant to the parties' agreement, Hoe was to manufacture a printing press. The press was manufactured in parts and final installation and erection of the press took place in Philadelphia under the supervision of a Hoe representative (49a). Indeed, the Hoe representative who supervised the erection of the press actually resided in Philadelphia during this time (9a, ¶ 10). Thus, contrary to Hoe's contentions, Hoe's performance under the contract did not take place solely in New York, but also took place in Philadelphia at the point of installation. Indeed, whether Hoe had performed at all under the contract could only be determined after the machinery was erected in Philadelphia and actually put into operation there.

The machinery was shipped in parts to Bulletin in Philadelphia by D. F. Bast, Inc., a trucking company employed by George R. Hall of Cleveland, Ohio. The Bulletin had engaged Hall to deliver the machinery, but Hall subcontracted the hauling to Bast (17a). The District Court found Hall to be an independent contractor of Bulletin (49a).

---

1. The District Court noted that there was a dispute between the parties as to where the binding contract was finally executed and assumed for the purposes of its opinion that final execution took place in New York when the contract dated February 2, 1967 was signed by a Hoe representative (50a). It is undisputed, however, that the Proposal and contract signed by Bulletin representatives were signed in Philadelphia, not in New York.

Although the contract stated that delivery was to be made f.o.b. Hoe's factory in New York, the contract provided that the risk of loss of the machinery was the responsibility of Hoe while the machinery was in New York and before it arrived in Philadelphia. The contract provided that Bulletin was to insure the machinery only "upon its arrival at destination" and that the risk of loss was on Bulletin only "after shipment and until such insurance is effective." (27a, ¶ 12).

After the machinery was installed and put into operation in Philadelphia, Bulletin experienced numerous operational difficulties with it (9a, ¶ 11). On at least a dozen occasions, Hoe representatives came to Philadelphia to attempt to rectify these problems. Hoe's repairs to the machinery did not succeed in rectifying the problems and Bulletin is still experiencing them to date (10a, ¶ 12). It should be noted that it was pursuant to the obligations of the parties' contract that Hoe made these trips to Philadelphia to repair the machinery (24a, ¶ 3). Thus, Hoe's performance under the contract included not only supervision of the machinery's installation in Philadelphia but also the performance of repairs in Philadelphia when it failed to operate as warranted.

Finally, all payments by Bulletin under the contract were made by mailing remittances from Philadelphia to Hoe (10a, ¶ 13). Contrary to Hoe's contention, therefore, Bulletin's alleged breach of contract did not take place in New York, but rather took place in Philadelphia, the point from which the payments were forwarded.

Based on the foregoing facts, Bulletin submits that it clearly has not transacted any business in New York within the meaning of CPLR § 302(a)(1) and that the District Court was clearly correct in reaching this conclusion upon the detailed evidence presented to it.

ARGUMENT.

I. The Detailed Evidence Overwhelmingly Supports the District Court's Ruling That, Under All of the Circumstances, Bulletin Did Not Transact Business in New York Under CPLR § 302(a)(1).

Hoe concedes that Bulletin is not doing business in New York and is not, therefore, subject to suit in New York under the provisions of CPLR § 301. Hoe contends, however, that Bulletin is subject to jurisdiction in New York pursuant to New York CPLR § 302(a)(1) which provides as follows:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:
>
> (1) transacts any business within the State; . . ."

Under the decided cases, the test of whether a non-resident has transacted business in New York within the meaning of the above-quoted provision is whether under all of the circumstances the non-resident has engaged in "purposeful activity" in New York. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N. Y. 2d 443, 261 N. Y. S. 2d 8 (1965), *cert. denied*, 382 U. S. 905 (1966).

In applying this test, it is clear that the New York Courts have not gone as far as the Constitution might permit them to go in acquiring jurisdiction over non-residents. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., supra; Lavie v. Marketscope Research Co., Inc.*, 336 N. Y. S. 2d 97, 99 (App. Div., 1st Dept. 1972); *A. Millner Co. v. Noudar, Lda.*, 266 N. Y. S. 2d 289, 293 (App. Div., 1st Dept. 1966).

In order to determine whether a non-resident defendant has engaged in purposeful activity in New York, the courts have weighed various factors. Among the factors considered in contract cases are (i) where the negotiations leading to the contract took place; (ii) where the contract was signed by the non-resident; (iii) whether the non-resident assumed the risk of loss of the goods sold under the contract while those goods were in New York; and (iv) whether the non-resident was present in New York in connection with the contract and, if so, for how long a period of time. As will be demonstrated below, an analysis of these factors, and others, as they apply to this case compels the conclusion that Bulletin has not engaged in purposeful activity in New York in connection with the contract in suit.

A. The Negotiations Which Led to the Contract in Suit Took Place in Philadelphia.

It is undisputed that all the face-to-face negotiations between the parties which led to the contract in suit took place at Bulletin's offices in Philadelphia. On approximately twelve occasions, a Hoe representative travelled to Philadelphia to negotiate the contract. No negotiations were ever held in New York.

It is clear under the decided cases that the negotiation of a contract in New York is an important factor to weigh in determining whether a non-resident has transacted business in New York under CPLR § 302(a)(1). See, e.g., *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N. Y. 2d 443, 261 N. Y. S. 2d 8 (1965), *cert. denied*, 382 U. S. 905 (1966); *Liquid Carriers Corp. v. American Marine Corp.*, 375 F. 2d 951 (2d Cir. 1967). At the outset, it is important to note, therefore, that there were no negotiations in New York in this case.

B. The Contract in Suit Was Signed by a Bulletin Representative in Philadelphia.

Throughout its Brief, Hoe emphasizes as an important factor in this case that final execution of the contract took place in New York. See Brief of Appellant, pp. 2, 3, 12. However, for at least three reasons, Hoe's reliance on the place of final execution of the contract is misplaced.

First, the place of execution of the contract is significant only where the *non-resident* executed the contract in New York. The ultimate question to be decided is whether the Bulletin engaged in purposeful activity in New York. If "final" execution of the contract took place in New York because *Hoe,* not Bulletin, signed the contract in New York, this has no bearing whatever on purposeful activity in New York by the Bulletin. It is undisputed that Bulletin signed both the contract dated February 2, 1967 and the Proposal of December 15, 1966 in Philadelphia, not in New York. As stated by McLaughlin in his Practice Commentary to CPLR § 302:

> ". . . [I]n Standard Wine & Liquor Co. v. Bombay Spirits Co., 1967, 20 N. Y. 2d 13, 281 N. Y. S. 2d 299, 228 N. E. 2d 367, even though the contract was executed in New York, jurisdiction was rejected, because the final act of execution was by the plaintiff. Whatever legal effect this may have on the plaintiff, the fact that plaintiff executed the contract in New York does not mean that the *defendant* transacted business here, and it is a transaction by defendant which is required by the statute. Again, in Agrashell, Inc. v. Bernard Sirotta Co., C. A. N. Y. 1965, 344 F. 2d 583 jurisdiction was rejected, though the contract was executed in New York." McLaughlin, Practice Commentary to CPLR § 302, *7B McKinney's Consol. Laws of N. Y.*, § C302.11, at page 78. (Emphasis in original)

The District Court was clearly correct, therefore, in not weighing as a factor in this case the execution of the contract by Hoe in New York. As the District Court said:

> "Where the contract was signed or executed is not determinative. *Green & White Construction Co. v. Columbus Asphalt Corp.*, 293 F. Supp. 279 (S. D. N. Y. 1968). And specially is this so where as here the defendant never entered New York to either negotiate or sign the agreement." (51a)

Secondly, it is submitted that Hoe's reliance on the place of execution of the contract is symptomatic of Hoe's confusion of choice of law with jurisdictional principles. Many of the factors relied on by Hoe as indicative of Bulletin's alleged transaction of business in New York are relevant to choice of law, not to jurisdiction. As noted by McLaughlin in his Practice Commentary:

> "Undue emphasis is sometimes placed upon the place of execution of the contract (see C302.11, *supra*) because of the importance attached to that place in choice of law considerations. Choice of law questions should not be confused with jurisdictional problems. It is not at all uncommon for the parties to have sufficient ties with New York to justify the application of New York law, and still lack sufficient contacts for a New York court to assert personal jurisdiction over the defendant. *Cf.* Agrashell, Inc. v. Bernard Sirotta Co., C. A. N. Y. 1965, 344 F. 2d 583. Conversely, situations may arise where New York may assert personal jurisdiction (*e.g.*, where the defendant is personally served in New York), and yet where the court is constitutionally required to apply the law of a sister state." McLaughlin, Practice Commentary to CPLR § 302, *7B McKinney's Consol. Laws of N. Y.*, § C302.14, at page 82.

Finally, Bulletin contends that final execution of the contract took place in Philadelphia when its representative signed Hoe's Proposal under the word "Accepted" on December 15, 1966 and promptly thereafter sent a payment of $58,871 to Hoe. Thus, even if the place of final execution were a factor to consider, final execution took place in Philadelphia, not in New York.

C. Risk of Loss of the Machinery Sold Under the Contract Was on Hoe, Not Bulletin, Until the Machinery Reached Philadelphia.

In Point III of its Brief, Hoe contends that another factor to consider is who bore the risk of loss of the machinery while the machinery was being transported out of New York. In this connection, Hoe relies on the case of *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F. 2d 583 (2d Cir. 1965). For several reasons, however, Hoe's reliance on risk of loss as a factor in this case is misplaced.

First, pursuant to the parties' agreement, risk of loss was on Hoe, not on Bulletin, until the machinery reached Philadelphia. Paragraph 12 of the contract provided that Bulletin was only required to insure the machinery "immediately upon its arrival at destination" and risk of loss was to be borne by Bulletin only "after shipment and until such insurance is effective." Logically, the parties intended risk of loss to pass simultaneously with Bulletin's obligation to purchase insurance. Thus, even though the contract stated that shipment was f.o.b. New York, the parties specifically agreed the risk of loss would not pass until the goods reached Philadelphia. Under the Uniform Commercial Code, risk of loss passes at the f.o.b. point "unless otherwise agreed." 62½ (Part I) *McKinney's Consol. Laws of New York* § 2-319. At best, the contract is ambiguous on this point. Since Hoe drafted the contract, any

ambiguity should be construed against it. *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N. Y. 342, 126 N. E. 2d 271, 273 (1955).

Second, even if the risk of loss were on the Bulletin, it cannot be said that for this reason Bulletin transacted business in New York. The shipment in question was a *single* shipment of machinery, which travelled through New York over a distance of five miles. Hoe's factory was at 910 East 138th Street in the Bronx, New York (17a). According to a standard map, the distance from Hoe's factory to New Jersey is approximately 5 miles. *Five Borough Atlas of New York City,* Geographic Map Co., Inc., Copyright 1964, p. 2. Even at a rate of speed of 20 miles per hour, this distance could be covered in 15 minutes. In view of these facts, any significance which attaches to risk of loss in this case is minimized by the infinitesimal time and distance that the goods actually travelled in New York.

In this connection, it should be noted that the *Agrashell* case, relied on by Hoe, is clearly distinguishable from the case at bar. In *Agrashell,* the non-resident shipped *ten* truckloads of walnuts into New York over an *eighteen-month* period in trucks which were *owned or leased by the non-resident.* Based on these facts this Court was of the view that upon whom the risk of loss fell was a point of some significance and it remanded the case for further evidence on this issue. 344 F. 2d at 588. In the case at bar, however, what is before the Court is a single shipment out of New York in a truck, neither owned nor leased by Bulletin, which travelled but a few miles in New York. Given these facts, risk of loss must necessarily be considered of less importance in this case than it was in *Agrashell.*

Thirdly, there have been a number of cases in which the Courts have found no jurisdiction over a non-resident under CPLR § 302(a)(1) even though the f.o.b. point was

New York and risk of loss was on the non-resident while the goods were in New York.

In *M. Katz & Son Billiard Products, Inc. v. G. Correale & Sons, Inc.*, 270 N. Y. S. 2d 672 (App. Div., 1st. Dept. 1966), *aff'd*, 285 N. Y. S. 2d 871 (1967), a non-resident buyer purchased from a New York resident goods which were shipped to the non-resident f.o.b. New York. The buyer and seller had transacted business with each other in this manner for 30 years. The Appellate Division of the New York Supreme Court held that there was no jurisdiction over the non-resident, and this decision was unanimously affirmed by the Court of Appeals. As noted in the Opinion of the District Court in this case, the *Katz* case "presented a situation similar to the one in this case." (50a). Indeed, the case at bar presents a situation of *less* purposeful activity in New York since, unlike *Katz*, there is no course of dealing over 30 years between Hoe and Bulletin.

Hoe seeks to distinguish *Katz* on the ground that (a) the contract in this case was written whereas in *Katz* it was not; (b) actual manufacture of the machinery by Hoe was in New York while in *Katz* the goods were apparently not manufactured in New York; and (c) the parties in this case understood that the contract was "centered" in New York far more than the parties did in *Katz*. These distinctions are, however, irrelevant. The question in this case is whether Bulletin engaged in purposeful activity in New York. It is not relevant to this issue whether the contract was written and whether performance by *Hoe* took place in New York. Further, as noted *supra*, Hoe seems to be confusing choice of law with jurisdiction principles. Whether the contract is "centered" in New York, while relevant to choice of law, is irrelevant to jurisdiction.

Similarly, in *Total Sound, Inc. v. Universal Record Distrib. Corp.*, 286 F. Supp. 123 (S. D. N. Y. 1968), plaintiff-

New York resident sued defendant-resident of Philadelphia on a contract to purchase phonograph recordings. A series of purchases were made by telephone or written order from Philadelphia. Shipments were made f.o.b. New York and payment was made by remittances mailed from Philadelphia. The Court held, relying on the *Katz* case, that defendant did not transact business in New York under CPLR §302(a)(1).

Finally, in *Klein v. E. W. Reynolds Co., Inc.*, 355 F. Supp. 886 (S. D. N. Y. 1973), plaintiff, trustee of a bankrupt seller, sued non-resident buyer on a contract entered into when an officer of the non-resident personally delivered the purchase orders to plaintiff in New York. Shipments pursuant to the contract were made f.o.b. New York. The Court held that these facts failed to establish sufficient purposeful activity in New York.

It is submitted that the case at bar is on all fours with the *Katz, Total Sound* and *Klein* cases, *supra.*

D. Bulletin Was at No Time Present in New York in Connection With the Contract in Suit.

In Point II of its Brief at p. 7, Hoe concedes that Bulletin was at no time present in New York in connection with the contract in suit. It contends, however, that the actions of D. F. Bast, Inc. in New York are attributable to Bulletin. As noted above in Bulletin's Counter Statement of the Facts, Bulletin engaged George R. Hall of Cleveland, Ohio to haul the machinery and the District Court found Hall to be an independent contractor. Hall then employed Bast as a subcontractor. Bast's actions in New York consisted of hauling the machinery from Hoe's factory and out of New York. As noted above in connection with the risk of loss, this trip amounted to a few minutes travel in New York over a short distance.

For at least two reasons, Hoe's reliance on Bast's actions in this case is misplaced.

First, Hoe refers to Bast as an "agent" of Bulletin. This was clearly *not* the case. Bast was a subcontractor of an independent contractor engaged by Bulletin. Contrary to the implication in Hoe's Brief, the New York courts have not abrogated the distinction between an independent contractor and an agent in determining whether the actions of such persons in New York may be attributed to a non-resident for jurisdictional purposes. In each of the three cases relied on by Hoe, the New York courts held that a principal-agent relationship was necessary between the non-resident and the person acting in New York in order to attribute the latter's acts to the non-resident.

For example, in *A. Millner Company v. Noudar, Lda.*, 266 N. Y. S. 2d 289 (App. Div., 1st Dept. 1966), the Court said:

> "If the plaintiff were an employee of or an agent acting exclusively for the defendant, plaintiff's acts, in and of themselves, performed for the defendant in New York would suffice to establish jurisdiction of the action against the defendant. (citations omitted) But it is asserted and not denied that the plaintiff is an independent broker representing many different companies on a commission basis, in no way under the defendant's control. In such circumstances the acts of the broker representative, the plaintiff herein, are not the acts of the so-called principal, and do not create a basis for jurisdiction against this defendant." (citations omitted) 266 N. Y. S. 2d at 293.

In *Legros v. Irving,* 354 N. Y. S. 2d 47 (Sup. Ct. N. Y. County 1973), plaintiff sued defendants deHory, Irving and others for libel as a result of the publication of a book.

Defendant deHory moved to dismiss on the ground of lack of jurisdiction. Plaintiff contended that deHory transacted business in New York through Irving. The Court agreed, finding that Irving was deHory's agent in New York since "Irving acted for the benefit of, and with the knowledge and consent of deHory, and *deHory retained some element of control over Irving's activities.*" 354 N. Y. S. 2d at 50 (emphasis added). In the case at bar, Bulletin did not even engage D. F. Bast, Inc. to act for it, let alone have any control over its activities.

In *Parke-Bernet Galleries, Inc. v. Franklyn,* 26 N. Y. 2d 13, 308 N. Y. S. 2d 337 (1970), defendant non-resident purchased paintings in New York by actively and personally participating in an auction by telephone. Defendant telephoned from California using a person at the New York end of the telephone line to place bids for him at the auction. The person acting in New York for defendant was customarily an employee of the parties running the auction. The Court found that defendant engaged in substantial purposeful activity in New York by participating personally in the auction through an agent. Indeed, the Court, relying on agency law, found the person in New York to be a "borrowed servant," that is, the Court found him to be a servant of the non-resident borrowed from the auctioneers.

The case at bar, of course, presents a situation even further removed from one in which it is contended that the acts of an independent contractor are attributable to a non-resident. In this case, Hoe contends that the acts of a subcontractor of an independent contractor are attributable to a non-resident. It is submitted that no New York Court has, or would, so hold.

Secondly, even if the acts of Bast in New York are attributable to the Bulletin, those acts were so minimal that they cannot be considered the transaction of business in New York. As discussed *supra,* Bast merely picked up the

machinery at Hoe's factory at 910 East 138th Street in the Bronx and travelled a short five-mile distance out of New York. In several cases it has been held that a non-resident did not transact business in New York even though the non-resident or his agent was present in New York in connection with the contract in suit. See, e.g., *Klein v. E. W. Reynolds Co., Inc.*, 355 F. Supp. 886 (S. D. N. Y. 1973) (no jurisdiction over non-resident defendant even though officer of defendant hand-delivered purchase orders in suit to plaintiff in New York); *Aurea Jewelry Creations, Inc. v. Lissona*, 344 F. Supp. 179 (S. D. N. Y. 1972) (no jurisdiction over non-resident even though he signed employment contract in New York, obtained a sample line of jewelry in New York and made two other visits to New York, over a week in length, in connection with the contract); *McKee Electric Co. v. Rauland-Borg Corp.*, 20 N. Y. 2d 377, 283 N. Y. S. 2d 34 (1967) (no jurisdiction over non-resident defendant even though two representatives of defendant spent a day in New York to resolve problems with goods sold under contract in suit); *Henlopen Mfg. Co. v. Carlson Tool & Mach. Co.*, 285 N. Y. S. 2d 396 (Sup. Ct., Suffolk County, 1967) (no jurisdiction over non-resident defendant even though defendant's representatives entered New York to participate in installation and testing of machinery sold to plaintiff).

In the case at bar Bast's acts, even if attributable to Bulletin, were considerably less in quality and quantity than the acts of the non-residents in the foregoing cases.

E. Under the Totality of the Circumstances, Bulletin Has Not Engaged in Purposeful Activity in New York.

While Hoe has emphasized the place of execution of the contract, risk of loss and Bast's actions in New York, it

has also referred to certain other factors which it alleges are sufficient, in the totality, to amount to the Bulletin's transaction of business in New York in connection with the contract in suit. Those other factors are: (a) the contract recites that New York law is to govern; (b) the contract price was in excess of one million dollars; (c) substantial performance of the contract by Hoe took place in New York; and (d) the alleged breach of the contract took place in New York. For the reasons discussed below, Hoe's reliance on these factors is misplaced.

(a) *The choice of law provision.*

Several courts have held that a choice of law provision reciting that New York law applies is not relevant to the issue of whether a non-resident transacted business in New York. See, e.g., *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F. 2d 583, 588 (2d Cir. 1965). As stated by the District Court in this case:

> "Nor is it decisive that the parties agreed that the contract was to be governed and interpreted in accordance with New York law. This choice of law provision cannot be construed as a voluntary submission by the defendant to the personal jurisdiction of the New York courts." *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F. 2d 583, 588 (2d Cir. 1965). (51a)

As noted above, many of the factors relied on by Hoe to assert jurisdiction over Bulletin are relevant not to jurisdiction but to whether New York law applies. Hoe's reliance on the choice of law provision is another example of Hoe's confusion between choice of law and jurisdictional principles.

(b) *The amount of the contract in suit.*

Hoe relies on the fact that the contract was for a sum in excess of one million dollars. Bulletin fails to see how

the amount of the contract is relevant to the issue of purposeful activity by Bulletin in New York. If there were an allegation in this case that Bulletin had engaged in a continuing volume of business with Hoe over a number of years, Bulletin could possibly see some relevance to the dollar amount of such volume. However, whether the contract in suit involved one million dollars or one thousand dollars, the facts relevant to the Bulletin's alleged purposeful activity in New York are not altered one way or the other.

(c) *Substantial performance took place in New York.*

Hoe contends that since *it* substantially performed the contract in New York, the exercise of jurisdiction over Bulletin is justified. Again, however, it is the activities of Bulletin, not of Hoe, that are in issue. Hoe's actions in New York have no bearing on the issue of jurisdiction.

(d) *Alleged breach of contract in New York.*

At one point in its Brief (p. 3), Hoe refers to Bulletin's "failure to make payment" in New York as a factor to consider. It has, however, been held by the New York Courts that nonpayment of funds which were required to be paid under a contract or note to a New York resident does not constitute purposeful activity in New York. See, e.g., *Bankers Comm. Corp. v. Alto, Inc.*, 289 N. Y. S. 2d 993 (App. Div., 1st Dept. 1968) (no jurisdiction over non-resident defendant even though payments due under contract were to be made, and were in fact partially made, in New York and visits were made to New York by defendant's representatives to settle differences under contract); *Pacific Concessions, Inc. v. Savard*, 347 N. Y. S. 2d 484 (Sup. Ct., Monroe County, 1973) (no jurisdiction over non-resident even though payment of note was to be made in New York and plaintiff performed advisory and supervisory work in New York on behalf of the non-resident).

In summary, then, a careful analysis of the facts reveals that under the totality of the circumstances Bulletin has not engaged in purposeful activity in New York. At best, the facts show that a subcontractor of an independent contractor engaged by Bulletin shipped goods out of New York over a distance of five miles. It is submitted that, for this reason, this case falls precisely within the rule that the mere shipment of goods into New York by a non-resident is insufficient to confer jurisdiction over that non-resident under CPLR § 302(a)(1). *Kramer v. Vogl,* 17 N. Y. 2d 27, 267 N. Y. S. 2d 900 (1966). This case merely presents the converse situation, that is, the mere shipment of goods out of, rather than into, New York.

II. The Exercise of Jurisdiction Over Bulletin in New York Would Be Unconstitutional in That It Would Offend Traditional Notions of Fair Play and Substantial Justice.

In *International Shoe Co. v. Washington,* 326 U. S. 310, 316 (1945), the Supreme Court held that in order to exercise jurisdiction over a non-resident, the non-resident must have "minimum contacts" with the forum state such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. In the case at bar, Bulletin lacks sufficient minimum contacts with New York and, therefore, jurisdiction may not be constitutionally asserted over it.

Bulletin has no employees or offices in New York, owns no property in New York, and circulates less than 1% of its newspapers in New York. The contract in suit was negotiated by the parties in Philadelphia and signed by Bulletin representatives in Philadelphia. No Bulletin representative was present in New York in connection with the contract. On facts similar to these, at least two courts

have found that the exercise of jurisdiction violated due process.

In *Aurea Jewelry Creations v. Lissona,* 344 F. Supp. 179 (S. D. N. Y. 1972), plaintiff sued the non-resident defendant for the return of a sample line of jewelry given to defendant in connection with his employment as a salesman. Defendant signed the employment contract with plaintiff in New York and obtained his sample line of jewelry at the same time. Later, he made two additional one-week trips to New York in connection with the contract. The District Court granted defendant's motion to dismiss for lack of jurisdiction stating as follows:

> "Unlike *Longines,* Aurea [plaintiff] and Lissona [defendant] engaged neither in substantial preliminary nor in final negotiations in New York. Goods were shipped out of, rather than into, New York. Lissona's performance under the contract was to be exclusively in the specifically enumerated mid-western states. Lissona's visits, which were paid for by the plaintiff contrary to their agreement, were of short duration as compared to those in *Longines.* Moreover, the discussions held in New York were for the purpose of resolving business differences. *See* McKee Electric Co. v. Rauland-Borg Corp., *supra.* Additionally, the only conduct complained of, namely, the failure to return the sample line of jewelry, took place in California. This case and *Longines* are clearly distinguishable.
>
> In sum, the court finds that defendant's contacts with the New York forum are insufficient to establish the requisite jurisdictional predicate. The maintenance of this suit, therefore, would offend 'traditional notions of fair play and substantial justice.' Internat.

Shoe Co. v. Washington, *supra,* 326 U. S. at 316, 66 S. Ct. at 158." 344 F. Supp. at 182-83.

Similarly, in *Sun-X International Co. v. Witt,* 413 S. W. 2d 761 (Tex. Civ. App. 1967), plaintiff, resident of Texas, sued defendant, resident of California, in a Texas court for breach of a distributor-dealer contract. Pursuant to the contract plaintiff shipped materials to defendant f.o.b. Houston, Texas. Defendant at no time was present in Texas in connection with the contract, although correspondence was mailed by defendant to plaintiff in Texas. The contract contained a choice of law provision to the effect that Texas law applied. The Court held, relying in part on the decision of this Court in the *Agrashell* case, that defendant did not have the requisite minimum contacts with Texas and affirmed the lower court's dismissal of the case.

The case at bar is on all fours with the *Aurea Jewelry* and *Sun-X* cases, *supra.*

CONCLUSION.

The judgment and order of the District Court dismissing this action for lack of *in personam* jurisdiction over Bulletin should be affirmed.

Respectfully submitted,

FRANK A. FRITZ,
JEFFREY S. COOK,
BLEAKLEY, PLATT, SCHMIDT & FRITZ,
120 Broadway,
New York, New York. 10005
Attorneys for Appellee.

Of Counsel:
JOHN R. MCCONNELL,
JOSEPH A. TORREGROSSA,
MORGAN, LEWIS & BOCKIUS,
123 South Broad Street,
2100 The Fidelity Building,
Philadelphia, Pa. 19109.

Dated: July 22, 1974.

Supplemental Appendix.

EXHIBIT 1 TO SUPPLEMENTAL AFFIDAVIT OF ALBERT SPENDLOVE.*

LETTERHEAD OF R. HOE & CO., INC.

BULLETIN COMPANY
30th and Market Streets
Philadelphia, Pennsylvania 19104

Attention: Mr. Albert Spendlove,

Vice President & Business Manager

Gentlemen:

Pursuant to our recent discussion we respectfully offer for your consideration this Proposal covering a new Hoe 8-Unit COLORMATIC Press, arranged substantially as shown in the appended Layout Drawing No. 5593-F, dated December 14, 1966.

Our prices for the equipment, predicated on shipping the Units and Folders in factory-assembled sections, and including provisions only for arranging the Units and Folders for Unit-Type Motor Drives, are as follows:

Eight (8) new Hoe COLORMATIC Newspaper Printing Press Units, 81" between side frames, with cylinders 14½" diameter over plates for 22¾" long page cut-off, 90-degree stagger, [Compression Type Lock-Up on all Plate Cylinders,] including:

* A portion of Exhibit 1 to the Supplemental Affidavit of Albert Spendlove was omitted in the printing of appellant's Appendix. It is reprinted herein in its entirety.

Latest-design new Hoe Inking System, embodying rail-mounted pumps engineered for unequalled rapid color changeover and, electrical control panels at side of Units, as well as feed and return lines along the front side of bedplate;

Algrip Platforming in the aisles between Units and Folders;

Tingulok Flaps for the impression cylinders;

Warner Cylinder Brakes mounted on front side of Plate Cylinder of each printing couple;

Within-the-arch Mist Guards for each Unit;

Sealed, transparent Plexiglass Covers on drive side of Units;

Two (2) Flush Mounted Pushbutton Stations per Unit;

Mounting and attaching nine (9) Unit-Type Drive Motors in our Shop;

Necessary Platforms, Handrails and Ladders to service toprail area;

Provisions only to accommodate an Ink Suppression System, exclusive of the Ink Suppressors.

One (1) Double Former, Single Delivery 3:2 Type Anti-Friction Bearing Newspaper Folder, with the folding and cutting cylinder mechanisms located on the rear side and an extended delivery to carry products to the front (operating) side of the press, and including two (2) continuous Tabloid Slitters and overload release clutch, including:

Warner Cylinder Brake for mounting on Cutting Cylinder;

Necessary Attaching Parts to accommodate a Tetco Recorder, exclusive of the Tetco Recorder itself;

One (1) Reversible Underfolder Web Lead including Single Side Leading-in Chain Device;

One (1) Double Upper Former, equipped to accept five (5) full web leads, three (3) sets of extra nipping rollers and two (2) motorized Balloon Compensators;

One (1) Electrical Variable Count Kicker;

Top-Rail Section of "open type" construction, generally comprising:

Eight (8) 6" diameter driven milled Drag Slitter Rollers, equipped with Quarter-Page Slitters, and eight (8) Motorized Straight Sheet Compensators located between Units instead of up in the top rails;

Eight (8) sets of Reversible Angle Bars, each equipped with a Motorized Compensator;

All Cut-Off Compensators will be motorized and operated by push-button control from central panel;

Extra-heavy, integrally-designed, cast iron Substructure, consisting of:

24" Bedplate and nine (9) pair of Substructure Columns to provide a height of 10 ft. 0 inches from Reelroom Floor to Pressroom Floor;

Eight (8) Hoe Three-Arm Paper Roll Reels, Tensions with Semi-Automatic Swinging Arm Pasters to duplicate Reels, Tensions and Pasters, existing in your plant, exclusive, however, of provisions for making these Fully-Automatic Pasters in the future;

Single Side Leading-in Chain Devices, to facilitate leading of Webs from the Reels to the arch of their respective Units;

One (1) pair of Columns to support area left vacant where future Unit No. 81 will occupy.

COLOR FACILITIES

One (1) Reversible Unit Mounted COLORMATIC Color Couple, for location on the second impression printing couple of Unit No. 77, including new Inking System, one (1) Motorized Compensator, necessary Connecting Rail and Web Lead Parts, Warner Cylinder Brakes and Compression Lock-Up on the Plate Cylinder;

Necessary drive due to the raising of the Drag Slitter Rollers one position to accommodate web leads from adjacent Color Couple;

Two (2) COLORMATIC Color Cylinders, for location on the second impression printing couple of United Nos. 75 and 80, each including New Inking System, Variable Stroke Vibrating Mechanism and Compression Lock-Up on the Plate Cylinders;

Three (3) Single Reversing Mechanisms, one (1) Double Reversing Mechanism and four (4) Manually-Operated Compensators in the Arch;

Five (5) Variable Stroke Vibrating Mechanisms, for the second impression couples of Unit Nos. 75, 77 and 80 and the first impression couple of Unit Nos. 76 and 80.

TOTAL PRICE $1,035,440.00

OPTIONAL EQUIPMENT

Option #1

Extra for Underside Lock-Up with Circumferential and Lateral Registering Means for thirteen (13) Plate Cylinders and Underside Lock-Up without circumferential and lateral adjustment for six (6) plate cylinders.

PLUS $47,430.00

Option #2

One (1) new Latest-Design Hoe Super-Production Double Former, Single Delivery 2:1 Type Anti-Friction Bearing Newspaper Folder "Q", with two (2) Tabloid Slitters, Overload Release Clutch and Warner Cylinder Brake mounted on folding cylinder, as well as provisions only to accommodate the future addition of a 3:2 folding and delivery mechanism;

24" Bedplate and one (1) pair of 10' 0" Substructure Columns;

Provisions only for arranging the Folder for Unit-Type Motor Drive, exclusive, however, of the Motor itself;

Mount and attach one (1) Unit-Type Drive Motor in our shop.

PLUS $71,800.00

Option #3

Connecting Rails and one (1) Drag Slitter Roller, equipped with Quarter-Web Slitter, one (1) set of Reversible Angle Bars including a Motorized Compensator, as well as a Special Drive due to the Drag Roller being raised one (1) position to accommodate the Color Couple on adjacent units;

PLUS $15,700.00

Option #4

Same equipment as outlined under Option #3, but, for two Drag Slitter Roller positions, etc.

PLUS $22,750.00

Option #5

Same equipment as outlined under Option #3, but, for three (3) Drag Slitter Roller positions, etc.

PLUS $29,800.00

Prices quoted herein are net f.o.b. our plant at New York, New York and are firm provided:

1) We have the pleasure of receiving your order on or before December 15, 1966;

2) And, if favored with your order, unless we are prevented from completing manufacture and shipment within the time stipulated due to circumstances such as, but not limited to, war, national emergency, insurrection or riot, acts of the public enemy or saboteurs, governmental acts, regulations or directives, or by some act or delay on your part. In such event, the parties in the Agreement will confer and agree upon a revision of the above selling prices that will reasonably reflect the changes, if any, in the basic costs of producing the equipment under those altered circumstances.

Based on our current workload, shipment of the Press Equipment quoted herein can begin in approximately twelve (12) months from receipt of your order, subject to delays due to causes beyond our control.

May we suggest terms of payment, in New York funds, as follows:

5% of the total purchase price stipulated herein to be paid, in cash, upon your acceptance of this Proposal;

10% of the total purchase price stipulated herein to be paid, in cash, at or before the commencement of engineering work;

70% of the total purchase price stipulated herein to be paid, in cash, in equal successive monthly installments during the period between the commencement of manufacturing and the estimated time of shipment;

The balance of the purchase price to be paid, in cash, when the equipment is installed and ready for commercial operation.

It is understood that all sales, excise or other taxes relating or pertaining to the sale or delivery of the equipment herein, whether imposed upon the Seller or Purchaser, or otherwise resulting from the contract herein, shall be added to the purchase price.

Upon your acceptance of this Proposal, we will prepare and submit to you the usual formal agreement.

Very truly yours,

R. Hoe & Co., Inc.

/s/ R. R. Dittrich
Vice-President—Press Sales

RRD:EKA
CC: Mr. Richard Powers
Mechanical Assistant
Production Manager

Accepted: Bulletin Company

By: /s/ Albert Spendlove

Date: 12/15/66

Option #1 /s/ AS

Option #2 /s/ AS

~~Option #3~~

Option #4 /s/ AS

~~Option #5~~

2 copies